

# UNITED STATES ARMY COURT OF CRIMINAL APPEALS

Before  
CHAPMAN, CLEVENGER, and STOCKEL  
Appellate Military Judges

**UNITED STATES, Appellee**  
**v.**  
**Sergeant BROOKE J. RITTER**  
**United States Army, Appellant**

ARMY 20010528

U.S. Army Combined Arms Center and Fort Leavenworth  
Robert F. Holland, Military Judge  
Colonel Kevin W. Bond, Staff Judge Advocate (trial)  
Colonel Michael W. Hoadley, Staff Judge Advocate (post-trial)

For Appellant: Colonel Robert D. Teetsel, JA; Lieutenant Colonel E. Allen Chandler, Jr., JA; Major Imogene M. Jamison, JA; Captain Mary E. Card, JA (on brief).

For Appellee: Lieutenant Colonel Margaret B. Baines, JA; Major Theresa A. Gallagher, JA; Captain Abraham F. Carpio, JA (on brief).

4 March 2005

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MEMORANDUM OPINION  
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CHAPMAN, Senior Judge:

A general court-martial composed of officer and enlisted members convicted appellant, in accordance with her pleas, of conspiracy to commit bank fraud, conspiracy to commit wire fraud, willful disobedience of a superior commissioned officer, violation of a lawful general regulation (ten specifications),<sup>1</sup> dereliction of

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<sup>1</sup> United States Disciplinary Barracks Regulation 190-3 (USDB Reg. 190-3), Personnel-General, RULES OF CONDUCT, dated 1 March 1999 and 27 July 2000 (the relevant portions of the regulation are identical in both versions), prohibits certain interaction between United States Disciplinary Barracks (USDB) personnel and inmates and former inmates. In Specification 1 of Charge III, appellant was convicted of violating USDB Reg. 190-3 by fraternizing and unlawfully

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duty, and sodomy, in violation of Articles 81, 90, 92, and 125, Uniform Code of Military Justice, 10 U.S.C. §§ 881, 890, 892, and 925 [hereinafter UCMJ]. The members sentenced appellant to a dishonorable discharge, confinement for two years, forfeiture of all pay and allowances, and reduction to Private E1. The convening authority approved only twenty-one months of confinement, but otherwise approved the sentence as adjudged. The case is before this court for review pursuant to Article 66, UCMJ.

Appellant raises three issues for this court's consideration. First, she maintains that the ten specifications of her violating a general regulation amount to an unreasonable multiplication of charges. We disagree with this assertion for the reasons stated below. Next, appellant argues that her guilty pleas to Specification 4 of Charge III and to The Specification of Additional Charge III are improvident. We agree that certain language in each specification is not supported by the admitted facts, but otherwise find appellant's pleas provident. We will strike the improvident language from each specification and reassess the sentence. Lastly, appellant asserts that the imposition of a dishonorable discharge, under the facts of this case, is

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(... continued)

communicating with an inmate and former inmate (RFF), in violation of paras. 3-2a(1) and 3-2c.(1). In Specification 2 of Charge III, appellant was convicted of fraternizing with another inmate, JF, in violation of para. 3-2a(1) of USDB Reg. 190-3. In Specification 3 of Charge III, appellant was convicted of allowing inmate JF to commingle with a female inmate, in violation of para. 3-2a(6) of USDB Reg. 190-3. In Specification 4 of Charge III, appellant was convicted of unauthorized contact and sexual misconduct with RFF, in violation of paras. 3-2a(2) and (7) of USDB Reg. 190-3. In Specification 5 of Charge III, appellant was convicted of using her privately-owned vehicle to give rides to RFF, in violation of para. 3-2a(3) of USDB Reg. 190-3. In Specification 6 of Charge III, appellant was convicted of allowing RFF to have access to appellant's quarters, in violation of para. 3-2b(4) of USDB Reg. 190-3. In Specification 7 of Charge III, appellant was convicted of accepting gifts from and giving gifts and other items to RFF, in violation of paras. 3-2b(1), (2), and (3) of USDB Reg. 190-3. In Specification 8 of Charge III, appellant was convicted of giving gifts and other items to JF and accepting gifts from JF, in violation of para. 3-2b(1), (2), and (3) of USDB Reg. 190-3. In Specification 10 of Charge III, appellant was convicted of unauthorized communication with a relative of RFF, in violation of para. 3-2c.(1) of USDB Reg. 190-3. In The Specification of Additional Charge III, appellant was convicted of fraternizing with former inmate RFF, in violation of para. 3-2a(1) of USDB Reg. 190-3.

inappropriately severe. We agree and will provide appropriate relief in our decretal paragraph.

Although not raised by appellant, we must determine whether Article 125, UCMJ, was constitutionally applied to appellant. We also note that the staff judge advocate, in his post-trial recommendation (SJAR), failed to correctly advise the convening authority of the proper finding for Specification 11 of Charge III, thus requiring us to take corrective action.

### **BACKGROUND**

From on or about October 1999 until on or about February 2001, appellant was a plumber assigned to the USDB at Fort Leavenworth, Kansas. Although not a military police guard or an internment or corrections specialist, appellant was a USDB cadre member equally responsible for supporting the discipline, custody, and control mission of the USDB. Like all USDB cadre personnel working in and around the USDB, appellant received training in the rules of conduct prescribed in USDB Reg. 190-3.

Inmates at the USDB are placed in work details supervised by cadre members skilled in a particular trade. Inmates RFF and JF were assigned to plumbing detail number 32 (Detail #32) supervised by appellant. While working with Detail #32, appellant developed a close, personal friendship with both inmates. Her friendship with RFF soon progressed into a romantic relationship, with both appellant and RFF expressing their affection for each other through sexual contact and in oral and written communications. During this time, appellant was married and had two young children, ages six and two.

Appellant's inappropriate relationship with RFF continued after RFF's release from the USDB. On the afternoon of RFF's release, appellant met RFF at a hotel near the Kansas City International Airport. A week earlier, appellant had reserved a room for her and RFF at the hotel. Instead of going back to work after lunch on the day of RFF's release, appellant drove to the hotel to meet him. She stayed with him at the hotel for the next two days, where they engaged in sexual intercourse and oral sodomy. Appellant failed to notify anyone in her chain-of-command of her whereabouts. She did not ask for leave. She later lied to her immediate supervisor when asked about her absence.

### **UNREASONABLE MULTIPLICATION OF CHARGES**

Applying the factors enunciated in *United States v. Quiroz*, 55 M.J. 334, 338 (C.A.A.F. 2001), to the facts of this case, we are satisfied that the specifications in Charge III did not misrepresent or exaggerate appellant's criminality, nor did they

unreasonably increase appellant's punitive exposure. The ten specifications alleging violations of a general regulation were each aimed at separate acts of prohibited behavior occurring on divers occasions between different time periods with two different inmates. There is no evidence of prosecutorial overreaching as evidenced by appellant's failure to object at trial, and the prosecution did not take what was one or two instances of conduct and unreasonably multiply them into more offenses. Appellant's assignment of error is without merit.

### PROVIDENCE OF PLEAS

We review a military judge's acceptance of a guilty plea for an abuse of discretion. *United States v. Eberle*, 44 M.J. 374, 375 (C.A.A.F. 1996). We will not disturb a guilty plea unless the record of trial shows a substantial basis in law and fact for questioning the plea. *United States v. Prater*, 32 M.J. 433, 436 (C.M.A. 1991). A providence inquiry into a guilty plea must establish that an accused believes and admits that he or she is guilty of the offense, and the factual circumstances admitted by an accused must objectively support the guilty plea. *United States v. Garcia*, 44 M.J. 496, 497-98 (C.A.A.F. 1996) (citing *United States v. Higgins*, 40 M.J. 67, 68 (C.M.A. 1994); *United States v. Davenport*, 9 M.J. 364, 367 (C.M.A. 1980)); see UCMJ art. 45(a).

As to Specification 4 of Charge III, appellant plead guilty to violating USDB Reg. 190-3 by wrongfully engaging in physical and sexual misconduct on divers occasions while kissing, hugging, and caressing RFF; permitting RFF to view her breasts, rub her breasts, and grab her buttocks; and engaging in sexual intercourse. Although appellant admitted to most of this misconduct during the providence inquiry and in a Stipulation of Fact, she never stated that she allowed RFF to rub her breasts as alleged.<sup>2</sup> Therefore, appellant's plea to that portion of the specification alleging that she allowed RFF to "rub her breasts" is improvident. We will strike the improvident portion of the specification and reassess the sentence.

In The Specification of Additional Charge III, appellant plead guilty to violating USDB Reg. 190-3 by wrongfully fraternizing with RFF by permitting RFF to spend time with her unattended children, and by her spending time with RFF in an apartment. The government concedes that spending time with appellant's children does not fall within the prohibitions of USDB Reg. 190-3 and, therefore, appellant's plea to that portion of the specification is improvident. But appellant admitted that

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<sup>2</sup> The Stipulation of Fact stated that appellant permitted RFF "to place his hands up under her BDU blouse on top of her brown T-shirt and feeling [sic] her breasts."

she lived with RFF in an apartment in Platte City. Thus, we are satisfied that appellant's plea of guilty to fraternizing with RFF by her spending time with him in an apartment is provident. Again, we will strike the improvident portion of the specification in our decretal paragraph and reassess the sentence.

### **SJAR ERROR**

Prior to arraignment, government counsel amended the language of Specification 11 of Charge III changing it from a violation of a lawful regulation to dereliction of duty. The military judge advised appellant of the elements of the offense of dereliction of duty by neglect. The military judge ultimately found appellant guilty of the amended specification. The SJAR wrongly advised the convening authority, however, that appellant was convicted of violating a lawful general regulation.

Unless indicated otherwise in his or her action, a convening authority approves only those findings as stated in the SJAR. *United States v. Diaz*, 40 M.J. 335, 337 (C.M.A. 1997). “[I]f the SJAR . . . misstates a finding of guilty, we have no jurisdiction to affirm it. We may either affirm only those findings of guilty . . . that are correctly and unambiguously stated in the SJAR, or return the case to the convening authority for a new SJAR and action.” *United States v. Henderson*, 56 M.J. 911, 913 (Army Ct. Crim. App. 2002) (citing *Diaz*, 40 M.J. at 337). Thus, the action taken on the finding for Specification 11 of Charge III is an error, and we must take corrective action. Rather than return this case to the convening authority, in the interest of efficient administration of military justice, we will dismiss this specification and reassess the sentence.

### **APPROPRIATENESS OF THE SENTENCE**

This court fully understands the importance of enforcing rules and regulations designed to maintain security, custody, and discipline within the prison environment at the USDB. Enforcement of these regulations ensures that the actions of every USDB cadre member, both on and off duty, do not undermine the ability of all personnel to function effectively among inmates nor compromise the safety, security, and control mission. Appellant's acts were serious abuses of these rules. While we are satisfied that appellant deserves a punitive discharge for her misconduct, we do not believe, however, that a dishonorable discharge is appropriate. Considering this offender was an easily manipulated, vulnerable soldier in the middle of a rocky marriage and with an otherwise good military record, the circumstances surrounding the commission of these offenses, and the errors previously noted in this opinion, we find that a dishonorable discharge is inappropriately severe.

## ARTICLE 125

Although not raised by appellant, we believe that we must determine if Article 125, UCMJ, is constitutional as applied to appellant's conduct. *United States v. Marcum*, 60 M.J. 198, 206 (C.A.A.F. 2004); *see Lawrence v. Texas*, 539 U.S. 558 (2003). We conclude that the facts of this case demonstrate that Article 125 was constitutionally applied to appellant.

Like the appellant in *Marcum*, at the time the offense was committed, appellant was in a position of responsibility and command with respect to her actions with all inmates. *See Marcum*, 60 M.J. at 208. Although the consensual sodomy occurred off the installation in the privacy of a hotel room, appellant's co-actor was a former inmate released from the USDB earlier that day. It is also significant to our analysis that appellant testified during the providence inquiry that she was aware such sexual conduct with this former inmate violated the rules and regulations that appellant had the responsibility to uphold. *See id.* By missing an afternoon of work to have an illicit liaison with a former inmate and by lying to her supervisor as to her whereabouts, appellant further undermined discipline within her unit.

The military and the USDB have a valid need to regulate relationships between USDB personnel and inmates and former inmates. Conduct that may impair or compromise the safety, security, custody, and control of others within the USDB conflicts with a cadre member's ability to properly perform his or her duties. Appellant's contact with a former inmate created a risk of conflict of interest between her official duties and such associations. Thus, appellant's conduct fell outside the protected liberty interest identified by the Supreme Court in *Lawrence v. Texas*. As a result, Article 125, UCMJ is constitutional as applied to appellant.

We have reviewed the matters personally raised by appellant under *United States v. Grostefon*, 12 M.J. 431 (C.M.A. 1982), and find them to be without merit.

## DECISION

The court affirms only so much of the finding of guilty of Specification 4 of Charge III as finds that appellant did, at or near Fort Leavenworth, Kansas, on divers occasions, between on or about 1 January 2000 and on or about 11 October 2000, violate a lawful general regulation, to wit: United States Disciplinary Barracks Regulation 190-3, paragraphs 3-2a(2) and (7), dated 1 March 1999 and 27 July 2000, by wrongfully engaging in physical and sexual misconduct with RFF, an inmate and then former inmate of the United States Disciplinary Barracks, to wit: kissing, hugging, and caressing each other; permitting said RFF to view and feel her breasts and grab her buttocks; and engaging in sexual intercourse.

The court affirms only so much of the finding of guilty of The Specification of Additional Charge III as finds that appellant did, at or near Fort Leavenworth, Kansas; Leavenworth, Kansas; and Platte City, Missouri, between on or about 1 February 2001 and on or about 27 February 2001, violate a lawful general regulation, to wit: United States Disciplinary Barracks Regulation 190-3, paragraph 3-2a(1), dated 27 July 2000, by wrongfully fraternizing with RFF, a former inmate at the United States Disciplinary Barracks, Fort Leavenworth, Kansas, to wit: by personally associating with said RFF and staying with him at an apartment at or near Platte City, Missouri.

The finding of guilty of Specification 11 of Charge III is set aside and Specification 11 of Charge III is dismissed. The remaining findings of guilty are affirmed. Reassessing the sentence on the basis of the errors noted, the entire record, and the principles of *United States v. Sales*, 22 M.J. 305 (C.M.A. 1986), the court affirms only so much of the sentence as provides for a bad-conduct discharge, confinement for twenty-one months, forfeiture of all pay and allowances, and reduction to Private E1.

Judge CLEVINGER and Judge STOCKEL concur.



FOR THE COURT:

A handwritten signature in black ink, which appears to read "Malcolm H. Squires, Jr.".

MALCOLM H. SQUIRES, JR.  
Clerk of Court